Office-Supreme Court, U.S.
FILED
JUN 20 1981
ALEXANDER L. STEVAS,
CLERK

NO. 80-1758

In the Supreme Court of the United States

OCTOBER TERM, 1980

JEROME W. HARPRING,
Petitioner

versus

CONTINENTAL OIL COMPANY
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether in an age discrimination in employment case the defendant corporation has met its burden by offering no specific objective proof of the plaintiff's "inadequate performance."

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

No. 80-1753
JEROME W. HARPRING,
Petitioner

v.

CONTINENTAL OIL COMPANY
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

Harpring v. Continental Oil Company, _____ F.2d (5th Cir. 1981, pet. reh. den.)

Harpring v. Continental Oil Company, 628 F.2d 406 (5th Cir. 1980)

Harpring v. Continental Oil Company, United States District Court for the Northern District of Mississippi, Eastern Division No. EC 77-192-S-O, Memorandum of Decision (July 16, 1979, Final Judgment July 11, 1979)

STATEMENT OF JURISDICTIONAL GROUNDS

(i) Judgment was entered in this cause by the United States Court of Appeals for the Fifth Circuit on October 16, 1980.

(ii) The United States Court of Appeals for the Fifth Circuit entered an Order denying Petitioner's Petition for Rehearing on January 21, 1981.

(iii) Jurisdiction to review this cause by Petition of Certiorari is conferred by 28 U.S.C. §1254 (1).

(iv) The Petition for a Writ of Certiorari was filed on April 20, 1981.

STATUTE INVOLVED

29 U.S.C. §623 (a)

(a) It shall be unlawful for an employer —

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

STATEMENT OF THE CASE

Employee Jerome W. Harpring (Harpring), forty-eight years of age, was hired by Continental Oil Company as a senior process engineer in October, 1974 for its Aberdeen, Mississippi chemical plant. Harpring was discharged by Conoco on August 1, 1977 when he was fifty years old. Harpring filed the requisite charge with the United States Department of Labor and a representative of the Wage and Hour Division investigated. In October, 1977 Harpring filed his complaint in the United States District Court for the Northern District of Mississippi, Eastern Division. At the time of trial, Conoco had not hired a replacement for Harpring (Pet. App. D-4).

Evidence adduced at trial showed that Harpring's former employment was as a chemical engineer in Boston, Massachusetts, and that he sought less demanding employment in a less difficult climate. His work was unsatisfactory from the beginning and remained so despite counseling and other extensive efforts by Conoco to salvage Harpring as a viable employee (Pet. App. D-4-7). The trial court found that Harpring was dismissed by Conoco for good cause (Pet. App. D-8). The Fifth Circuit Court of Appeals affirmed the decision on October 16, 1980 (Pet. App. A-1) and denied Harpring's petition for rehearing on January 21, 1981 (Pet. App. C-1).

ARGUMENT

Harpring's stated question for review is whether or not an age discrimination defendant employer has met its burden of proof if it offers "no specific objective proof of the plaintiff's 'inadequate performance.'" (Pet. i). In effect Harpring contends that the trial court erred in the standard by which it measured the burden of proof require of both parties, in the facts it found, and that the appeals court erred in affirming the trial court's decision.

1. The contention that the Fifth Circuit Court of Appeals should have reversed the district court's findings of fact and choices of credibility is devoid of merit. The Federal Rules of Civil Procedure require the appellate courts to insulate the findings of fact with a protection which is inviolate unless those findings are clearly erroneous (F.R.Civ.P. 52(a)). In the instant case, the court concluded that a review of the entire record failed to convince it that the court below had made a mistake, or that the trial court's findings were clearly erroneous. *Harpring v. Continental Oil Company*, 628 F.2d 406, 409 (5th Cir. 1980).

The district court's Memorandum of Decision details Harpring's evidence that his work was of the highest quality, his performance adequate, that the average age of professionals in the Aberdeen plant dropped in the fall of 1974 after a change in

management (Pet. App. D-3-4). The Decision juxtaposes Conoco's evidence that Harpring's work was unsatisfactory, that as a supervisor of the junior engineers he was ineffective, that he avoided responsibility, produced work that was disorganized and incomplete, that he forgot assignments unless pushed, that Conoco counseled Harpring for eleven months prior to his dismissal, alleviated some of his duties to try to improve his performance, and that, according to company policy, he should have been discharged three months prior to the time that he was actually dismissed (Pet. App. D-4-7).

The appellate court, in review, found nothing which was clearly erroneous in the trial court's findings, and properly left the shield of Rule 52(a) intact. *Williams v. Tallahassee Motors, Inc.*, 607 F.2d 689 (5th Cir. 1979).

2. Harpring's central contention in his Petition for Writ of Certiorari is that the circuit courts of appeals disagree regarding the defendant's burden of proof in age discrimination cases; therefore, this case must be heard in order to clearly define the terms "production" and "going forward with the evidence." (Pet. 10). He points to four cases to illustrate his point. *Long v. Ford Motor Company*, 496 F.2d 500 (6th Cir. 1974) was tried prior to the ruling in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817 (1973) and was remanded to apply the "principles on the order and allocation of proof" as enunciated in that decision (*id.* at 505). *Holthaus v. Compton & Sons,*

Inc., 514 F.2d 651 (8th Cir. 1975) reiterates the *McDonnell Douglas* rule:

> Initially, the plaintiff carries the burden of establishing a prima facie case of discrimination. The burden then shifts to the employer to explain the action alleged to be discriminatory. Finally, the plaintiff should have a fair opportunity to show that the reasons asserted by the defendant were merely a pretext for discrimination." (*id.* at 652).

Vulcan Society of the N.Y. City Fire Dept., Inc. v. Civil Service Commission, 490 F.2d 387 (2d Cir. 1973), another pre-*McDonnell Douglas* case, concerned a hiring test which was shown to have a racially disproportionate impact, but which was alleged to be a bona fide occupational qualification. The *Vulcan* Court found that the defendant's burden was "not simply a burden of going forward but a burden of persuasion" because the defendant urged that the examination was "substantially related to job performance." (*id.* at 393). This ruling is in accord with other circuits in cases in which the defendant urges a BFOQ defense. The Fifth Circuit explains why the BFOQ defendant has the burden of persuasion while the good cause defendant's burden is one of mere production:

> The reason for that distinction is clear . . . . An age-related BFOQ permits an employer to admit that he has discriminated on the basis of age, ... The good cause and differentiating factor exceptions, on the other hand, are denials of the plaintiff's prima facie case. Plaintiff says that the employer fired him because of his age; employer replies, in effect, not so, plaintiff was fired for excessive absences, general

> inability, or some other non-discriminatory reason. The natural tendency of the court to place the burden of proof upon the party desiring change and the special policy considerations disfavoring the statutory exceptions both justify the distinction between these defenses. (Citation omitted). *Marshall v. Westinghouse Electric Corporation*, 576 F.2d 588, 591 (5th Cir. 1978).

Harpring's fourth case is *Sweeney v. Board of Trustees of Keene State College*, 569 F.2d 169 (1st Cir. (1977) which the United States Supreme Court accepted in order to accomplish the same result for which Harpring petitions this court; *i.e.*, to clarify the burden of proof required in discrimination cases. The Court reaffirmed the *McDonnell Douglas* rule that in order to rebut a prima facie case of discrimination, a defendant "need only 'articulate some legitimate, nondiscriminatory reason for the employee's rejection.' " *Board of Trustees of Keene State College v. Sweeney* 439 U.S. 24, 99 S.Ct. 295 (1978). The First Circuit Court had misread *McDonnell;* therefore, the Supreme Court explained:

> While words such as "articulate," "show," and "prove," may have more or less similar meanings depending upon the context in which they are used, we think that there is a significant distinction between merely "articulat[ing] some legitimate, nondiscriminatory reason" and "prov[ing] absence of discriminatory motive." By reaffirming and emphasizing the *McDonnell Douglas* analysis in *Furnco Construction Co. v. Waters, supra*, we made it clear that the former will suffice to meet the employee's prima facie case

> of discrimination. Because the Court of Appeals appears to have imposed a heavier burden on the employer than *Furnco* warrants, its judgment is vacated and the case is remanded . . . . (*id.* at 295, 296)

The First Circuit Court of Appeals applied *Sweeney* in *Loeb v. Textron, Inc.*, 600 F.2d 1003 (1st Cir. 1979), an age discrimination case:

> We think it now clear that *McDonnell Douglas* leaves the burden of persuasion at all times with the plaintiff, and that the employer's burden to "articulate" a legitimate, nondiscriminatory reason is not a burden to persuade the trier that he was in fact motivated by that reason and not by a discriminatory one. Rather it is a burden of production — *i.e.*, a burden to *articulate* or *state* a valid reason, following which the complainant must show that the reason so articulated or stated is a mere pretext or "cover-up" for what was in truth a discriminatory purpose. This, indeed, is only logical. If an employer were to *prove* that he was motivated by a legitimate reason, there would be no room left for showing that that reason was a "pretext," as pretext is "a purpose or motive alleged or an appearance assumed in order to cloak the real intention or state of affairs." Webster's Third New International Dictionary (1971). (*id.* 1011, 1012).

Rather than being in disagreement, as Harpring contends, the Circuit Courts of Appeals are in accord with the *Sweeney* holding regarding the burden of proof required of the defendant in a good cause defense of an age discrimination case. The Tenth Circuit burdened the defendant in *Schwager v. Sun Oil Company of Pennsylvania*, 591 F.2d 58, in 1979: ". . . [T]he burden of going forward with the evidence shifts to the defendant -employer. Once the defendant-employer produces evidence

tending to show that the termination was based on reasonable factors other than age,. . . ." (*id.* at 61). In 1980, the Second, Third, Fourth, Fifth, and Seventh Circuits measured the ADEA defendant's burden of proof against the *Sweeney* test. *Geller v. Markham*, 635 F.2d 1027 (2d Cir. 1980); *Smithers v. Bailar*, 629 F.2d 892 (3d Cir. 1980); *Smith v. Flax*, 61 F.2d 1062 (4th Cir. 1980); *Carter v. Maloney Trucking & Storage, Inc.*, 631 F. 2d 40 (5th Cir. 1980); *Kephart v. Institute of Gas Technology*, 630 F.2d 1217 (7th Cir. 1980). The Eighth Circuit approved the district court's use of the *McDonnell Douglas* test in *Hughes v. Black Hill Power and Light Company*, 585 F.2d 918 (8th Cir. 1978); the Ninth Circuit relied on *Smith v. Flax, supra*, in *Kelly v. American Standard, Inc.*, 640 F.2d 974 (9th Cir. 1981). The Sixth and D.C. Circuits used the *Sweeney* test in recent Title VII cases (Civil Rights Act 1964, § 701 et seq. as amended 42 U.S.C. § 2000e et seq.), and presumably will apply that same standard when an age discrimination case comes before them. *Grano v. Department of Development of City of Columbus*, 637 F.2d 1073 (6th Cir. 1980), relying on *Smithers v. Bailar, supra; Bostick v. Boorstin*, 617 F.2d 871 (D.C. Cir. 1980).

CONCLUSION

Although "certainty generally is illusion, and repose is not the destiny of man" (Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 461, 1897), the question of the proper

burden of proof of ADEA parties is no longer illusory; it has been made certain, laid to rest by the decision in *Board of Trustees of Keene State College v.Sweeney* 439 U.S. 24, 99 S. Ct. 295 (1978).

The Petition for a Writ of Certiorari should be denied for two reasons:

1. The Court, having fully resolved the issue in the *Sweeney* decision, need not address it again; and,

2. The Circuit Courts of Appeals, having unanimously adopted the *Sweeney* standard, require no further elucidation.

Respectfully submitted,

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By /S/ Jan P. Patterson
Jan P. Patterson

CERTIFICATE OF SERVICE

I, Jan P. Patterson of the firm of Patterson & Patterson, do hereby certify that I have this day, mailed a copy of the above Brief of Appellee to the Honorable William M. Pace, attorney for the plaintiff, at his office at Post Office Box 112, Aberdeen, Mississippi 39730.

This the day of June, 1980.

/S/ Jan P. Patterson

Jan P. Patterson

Appendix A

SUBSIDIARIES AND AFFILIATES OF CONOCO, INC.

Big Sky of Montana Realty, Inc.

Calcasieu Chemical Corporation

Condea Chemie, GmbH

CitCon Oil Corporation

Conch International Methane, Ltd.

Conoco, A.G.
- Petroquimica Espanola, S.A. (Petresa)*
- T.A.L. (Austria)*
- T.A.L. (Italy)*
- T.A.L. (Luxembourg)*

Conoco (U.K.) Limited
- Benzene Marketing Co. Ltd.*
  - Associated Petroleum Terminals Ltd.*
  - Cliffe Storage Ltd.*
  - Crude Oil Terminals (Humber) Ltd.
  - Humber Oil Terminals Trustee Ltd.
  - Petroleum Storage Ltd.
  - Warwickshire Oil Storage Ltd.
- K/s Statfjord Transport A.S. & Co.
- Statfjord Transport A.S.

Conoco Management Company
- Conoco Exploration, Ltd.*

Conoco Mineraloel GmbH
- T.A.L*

Conoco North Sea, Inc.

*Indicates partially owned company of wholly owned subsidiary.

Conoco Norway Inc.
- K/s Statfjord Transport A.S. & Co.*
- Statfjord Transport A.S.*

Consolidation Coal Company - 100%
- Bishop Coal Company*
- Cardinal River Coals, Ltd.*
- Contochu, Inc.*
- Harmar Coal Company*
- Itmann Coal Company*
- Mathies Coal Company*
- Neptune Bulk Terminals (Canada) Limited

Continental Carbon Company
- Carbon Black Espanola, S.A.
- Columbian Continental Europa, S.p.A.
- Compagnie Francaise du Carbon Black, S.A.
- Continental Carbon Australia Pty. Limited
- Continental Columbian Carbon Nederland, B.V.
- Continex Francaise S.A.R.L.
- Continex Nederland B.V.
- Continex S.r.l.

Continental Oil Company of Chad
- SEERAT*

Continental Oil Company of Libya*
- Oasis Oil Co. of Libya, Inc.

Continental Pipe Line Company
- Colonial Pipeline*
- Dixie Pipeline*
- Lake Charles Pipe Line*
- Pioneer Pipe Line Company*
- Platte Pipe Line*
- Seadock, Inc.*
- Seaway Pipeline, Inc.*
- West Shore Pipe Line*
- Yellowstone Pipe Line*

Explorer Pipeline Company

Felix Oil Company

*Indicates partially owned company of wholly owned subsidiary.

Hudson's Bay Oil and Gas Company Limited
- Alberta Gas Truck Line Company, Ltd.
- Aurora Pipe Line Company
- Cansulex Ltd.
- Chieftain Mac Gas Ltd.
- Hudbay Exploration, Inc.
- Hudbay Mining Limited
- Hudbay Oil Company of Denmark A/S
- Hudbay Oil Company of Denmark Ltd.
- Hudbay Oil (Australia) Ltd.
- Hudbay Oil (Brazil) Ltd.
- Hudbay Oil (Egypt) Ltd.
- Hudbay Oil (Indonesia) Ltd.
- Hudbay Oil International Ltd.
- Hudbay Oil (Ireland) Ltd.
- Hudbay Oil (Malacca Strait) Ltd.
- Hudbay Oil (Natuna) Ltd.
- Hudbay Oil (Netherlands) Ltd.
- Hudbay Oil (Quebec) Ltd.
- Hudbay Oil (Spain) Ltd.
- Hudbay Oil (Turkey) Ltd.
- Hudbay Uranium Ltd.
- Hudson's Bay Oil and Gas Company (U.K.) Limited
- Norske Hudbay A/S
- Northward Developments, Ltd.
- Peace Pipe Line, Ltd.
- Rangeland Pipe Line Company Limited
- Rimbey Pipeline Co., Ltd.
- Smiley Gas Conservation Ltd.
- Sultran Ltd.
- Syncrude Canada, Ltd.

Kettleman North Dome Association

Long Beach Oil Development Company

Maritime Protection A/S
- A/S Soties Plass 2
- Maritime Protection (PTE) Ltd.
- Maritime Protection Inc.

*Indicates partially owned company of wholly owned subsidiary.

Nippon Aluminum Alkyls, Ltd.

Nissan Conoco Corporation

Oil Shippers Service, Inc.

OMW (Karlsruhe)

Pasa Petroquimica Argentina, S.A.

Petroleum Terminals, Inc.

Petrocokes, Ltd.

San Jacinto Eastern Corporation
- Iranian Investment Corp.
- Iranian Oil Participants Ltd.
- Iranian Oil Services (Holdings) Ltd.
- Iricon Agency, Ltd.*

Selang Ltd.

Southern Facilities, Inc.

Sulitjelma Elektronikk A/S

The Standard Shale Products Company*

Tidelands Royalty Trust

*Indicates partially owned company of wholly owned subsidiary.